

operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

25. Section 90.913 is revised to read as follows:

§ 90.913 Eligibility for small business status.

(a) Short-Form Applications: Certifications and Disclosure.

Each applicant for an EA license which qualifies as a small business or consortium of small businesses under §§ 90.912(b) or (c) shall append the following information as an exhibit to its short-form application (FCC Form 175):

(1) The identity of the applicant's affiliates and controlling principals, and, if a consortium of small businesses (or a consortium of very small businesses), the members of the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.912.

(b) Long-Form Applications: Certifications and Disclosure.

In addition to the requirements in subpart V of this part, each applicant submitting a long-form application for license(s) for Spectrum Blocks A through V and qualifying as a small business shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 90.912, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling principals, and, if a consortium of small businesses (or consortium of very small businesses), the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business, very small business, consortium of small businesses or consortium of very small businesses under §§ 90.910 and 90.912, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) Records Maintenance. All winning bidders qualifying as small businesses or very small businesses, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including any document necessary to establish eligibility as a small business, very small business and/or consortium of small businesses (or consortium of very small businesses) under § 90.912. Licensees (and their successors in interest) shall maintain such files for the term of the license.

(d) Audits.

(1) Applicants and licensees claiming eligibility as a small business, very small business or consortium of small businesses (or consortium of very small businesses under §§ 90.910 and 90.912 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed 800 MHz SMR service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(3) *Definitions.* The terms affiliate, small business, very small business consortium of small businesses, consortium of very small businesses, and gross revenues used in this section are defined in § 90.912.

* * * * *

APPENDIX C

Canadian Regions

Spectrum Block	Channels Available in Regs 1, 4, 5 & 6	Channels Available in Region 2	Channels Available in Region 3	Channels Available in Regions 7 & 8
A	None	None	4	12
B	18	None	44	32
C	72	55	72	48
D	1	2	5	6
E	2	3	5	6
F	2	None	5	6
G	None	None	None	5
H	None	None	None	5
I	None	None	None	5
J	None	None	None	5
K	None	None	None	5
L	None	None	None	5
M	None	None	None	5
N	None	None	None	5
O	None	None	None	5
P	None	None	None	5
Q	None	None	None	5
R	None	None	None	5
S	None	None	None	5
T	None	None	None	5
U	None	None	None	5
V	None	None	None	5

Mexican Border Area

Spectrum Block	Offset Channels Available
A	3
B	12
C	18
D	4
E	4
F	4
G	3
H	3
I	3
J	3
K	3
L	3
M	3
N	3
O	3
P	3
Q	3
R	3
S	3
T	3
U	3
V	5

APPENDIX D

Final Regulatory Flexibility Analysis
Second Report and Order
and
Memorandum Opinion and Order on Reconsideration

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rulemaking (Second Further Notice)* in PR Docket No. 93-144.¹ The Commission sought written public comment on the proposals in the *Second Further Notice*, including the IRFA. This Final Regulatory Flexibility Analysis to accompany final rules in both the *Second Report and Order* and the accompanying *Memorandum Opinion and Order on Reconsideration*² conforms to the RFA, amended by the Contract With America Advancement Act of 1996.³

A. Need for and Purpose of this Action:

In this *Second Report and Order*, the Commission establishes a flexible regulatory scheme for the 800 MHz Specialized Mobile Radio (SMR) service to promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The rules adopted in the *Second Report and Order* also implement Congress's goal of regulatory symmetry in the regulation of competing commercial mobile radio services as described in Sections 3(n) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(n), 332 (Communications Act), as amended by Title VI of the Omnibus Budget Reconciliation Act of 1993 (Budget Act). The Commission also adopts rules regarding competitive bidding for the remaining 800 MHz SMR spectrum based on Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services, including 800 MHz SMR.

B. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in response to the IRFA. However, there were several comments concerning the potential impact of some of the Commission's proposals on small entities, especially on certain incumbent 800 MHz SMR licensees.

The Commission adopted geographic area licensing for the lower 230 800 MHz SMR channels in order to facilitate the evolution of larger 800 MHz SMR systems covering wider areas and offering

¹ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995) (collectively, *800 MHz Report and Order*).

² Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224 (released July 10, 1997).

³ The RFA, *see* 5 U.S.C. § 601 *et seq.*, was amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

commercial services to rival other wireless telephony services. Some licensees that were not SMR licensees opposed this plan arguing that it was unsuitable to the needs of smaller, private systems, which do not seek to cover large geographic areas in the manner of commercial service providers.⁴

The Commission adopted a portion of a proposal set forth by a number of incumbent 800 MHz SMR licensees ("Industry Proposal") and allotted three contiguous 50-channel blocks from the former General Category block of channels. Some commenters argued that allotting such large contiguous blocks would not suit the needs of smaller SMR systems, which typically trunk smaller numbers of non-contiguous channels.⁵ These commenters argued that large blocks of contiguous channels could be prohibitively expensive to bid for at auction, thereby limiting the opportunities for smaller operators to take advantage of geographic area licensing.

The Commission adopted a proposal to allow incumbent licensees in the lower 230 channels to make system modifications within their interference contours without prior Commission approval, so long as they do not expand the 18 dBμV/m interference contour of their systems. Proponents of the Industry Proposal argued for an alternative plan to limit incumbent expansion rights on the lower 230 channels.⁶ The Industry Proposal called for the Commission to permit incumbent licensees in the lower 230 channels to negotiate expansion rights within each EA through a settlement process.⁷ The proposed settlement process would occur on a channel-by-channel basis prior to the auction of the lower 230 channels, but after incumbents on the upper 200 channels had had an opportunity to relocate or retune to the lower 230 channels. For each channel, incumbents licensed on the channel within the EA would negotiate among themselves to allocate rights to the channel within the EA.⁸ If all incumbents on the single channel negotiated an agreement for use of that channel within the EA (e.g., by forming a partnership, joint venture, or consortium), they would then receive an EA license for that channel.⁹ If only one incumbent operated on the channel within an EA, it would receive an EA license for that channel automatically.¹⁰ If incumbents on a channel were unable to reach a settlement, the channel would be included in the auction of the lower 230 channels. The Industry Proposal called for non-settling channels in the lower 80 channels to be auctioned in five-channel blocks and the 150 General Category channels to be auctioned in three 50-channel blocks.¹¹

Commenters argued, *inter alia*, that the Industry Proposal would provide significant

⁴ American Mobile Telecommunications Association, Inc. (AMTA) Comments at 18; Nex

⁵ Sierra Electronics (Sierra) Comments at 2; Fresno Mobile Radio, Inc. (Fresno) Comments at 24.

⁶ See SMR WON, AMTA, Nextel Joint Reply Comments *seriatum*.

⁷ *Id.*

⁸ *Id.* at iii.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

opportunities for small businesses.¹² Although commenters acknowledged that auctions are a fast and generally efficient means of licensing new spectrum, they argued that small businesses will "have no chance of succeeding in gaining the spectrum they need for future growth if they must compete against larger entities with deeper pockets."¹³ The commenters contended that, in the case of non-SMR licensees, the provision of communications services is not their primary business and they will not be in the position to compete with commercial operators at auction.¹⁴

The Commission adopted rules allowing all 800 MHz SMR licensees to partition their market areas and to disaggregate their spectrum. Commenters generally supported these new rules arguing that partitioning and disaggregation will result in more participation in the marketplace by small entities and allow coalitions of smaller entities to bid at auction.¹⁵

The Commission adopted a proposal to auction the Lower 80 channels and the General Category channels. Some commenters argued that there is little space in the Lower 80 and General Categories and that there was no mandatory relocation proposal for incumbents in these channels.¹⁶ These commenters argue that the combination of these factors will further frustrate incumbent licensees in these channels when incumbents from the Upper 200 channels are relocated.¹⁷ Several other commenters argue that they are not financially capable of participating in the auction of the Lower 80 channels and General Category.¹⁸ These commenters believe that the auction process favors large entities and that the large entities an effectively stifle competition in the auction process including the delaying the conclusion of the auction.¹⁹

The Commission adopted its proposal for a minimum bid increment of the greater of \$.01 per MHz-pop, or 5% percent of the high bid from the previous round. E.F. Johnson argued that minimum bid increments should be reduced or eliminated to facilitate small business participation in the auction.²⁰

The Commission adopted a two-tiered small business definition. In order to be eligible for designated entity provisions, an applicant must qualify as a "small business," where an entity must

¹² The Personal Communications Industry Association (PCIA) later joined in support of the Industry Proposal. See AMTA, SMR WON, PCIA and Nextel *Ex Parte* Filing (September 6, 1996).

¹³ *Id.* at 5.

¹⁴ *Id.* at 6.

¹⁵ AMTA Comments at 8; Fresno Comments at 6 & 8.

¹⁶ Entergy Services, Inc. (Entergy) Comments at 8; Southern Company (Southern) Comments at 13.

¹⁷ Entergy Comments at 8; Southern Comments at 13.

¹⁸ Wiztronics, Inc. (Wiztronics) Comments at 1; Sierra Comments at 2; Utilities Telecommunications Council (UTC) Comments at 13-14.

¹⁹ Entergy Comments at 10; Wiztronics Comments at 2-3; Keller Communications, Inc. (Keller) Comments at 2-3; Southern Comments at 14-15.

²⁰ E.F. Johnson Company (E.F. Johnson) Comments at 9.

have had average gross revenues of not more than \$15 million for the preceding three years or as "very small business," where a company must have had average gross revenues of not more than \$3 million for the preceding three years.

The Commission adopted bidding credit amounts that were tailored to the Commission's small business definition. Specifically, small businesses with average gross revenues of not more than \$15 million for the preceding three years will receive a 10 percent bidding credit and those entities with average gross revenues of not more than \$3 million for the preceding three years will receive a 15 percent bidding credit. Some commenters expressed concern that the proposed bidding credits were too low.²¹ Coral Gables argued that the bidding credits for public safety entities should be set at a different level than non-public safety entities.²²

The Commission did not adopt an entrepreneurs' block for the Lower 80 and General Category channels. Some commenters argued that by establishing an entrepreneurs' block, some incumbents could be unfairly excluded from participation in the auction because some incumbents in these channels are larger companies.²³ Nextel argued that the adoption of an entrepreneurs' block would contravene the goal of regulatory parity since there is no set-aside in the cellular service and only one-third of the broadband PCS spectrum was set aside for small businesses.²⁴

C. Description and Number of Small Entities Involved

The rules adopted will apply to current 800 MHz SMR operators and new entrants into the 800 MHz SMR market. Under these rules, Economic Area (EA) licenses will be granted on a market area basis, instead of site-by-site, and mutually exclusive applications will be resolved through competitive bidding procedures. In order to ensure the more meaningful participation of small business entities in the auction for mutually exclusive geographic area 800 MHz SMR licenses, the Commission, as noted, has adopted a two-tier definition of small businesses. A very small business will be defined for these purposes as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million. A small business will be defined as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million. The Small Business Administration (SBA) has approved these definitions for 800 MHz SMR services.

The Commission anticipates that a total of 3,325 EA licenses will be auctioned in the lower 230 channel blocks of the 800 MHz SMR service. This figure is derived by multiplying the total number of EAs (175)²⁵ by the number of channel blocks (19) in the lower 230 channels.²⁶ Auctions of

²¹ Keller Comments at 2; Sierra Comments at 2.

²² City of Coral Gables, Florida (Coral Gables) Comments at 9.

²³ See e.g., Southern Comments at 16; UTC Comments at 14.

²⁴ Nextel Comments at 8-11.

²⁵ The Department of Commerce Bureau of Economic Analysis has established 172 EAs which cover the continental United States. See "Final Redefinition of the BEA Economic Areas, 60 Fed. Reg. 31,114 (Mar. 10, 1995). The Commission has established three additional EA licensing regions for the five U.S. possessions.

800 MHz SMR licenses have not yet been held, and there is no basis to determine the number of lower 230 channel licenses that will be awarded to small entities. However, the Commission assumes, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that all the auctioned 3,325 geographic area 800 MHz SMR licenses in the lower 230 channels will be awarded to small entities, as that term is defined by the SBA.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Geographic area 800 MHz SMR licensees may be required to report information concerning the location of their transmission sites under some circumstances, although generally they will not be required to file applications on a site-by-site basis. Additionally, geographic area license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for 800 MHz SMR licenses by filing a short-form application (FCC Form 175). Winning bidders will file a long-form application (FCC Form 600) at the conclusion of the auction. Additionally, entities seeking treatment as small businesses will need to submit information pertaining to the gross revenues of the small business applicant and its affiliates and controlling principals. Such entities will also need to maintain supporting documentation at their principal place of business.

Section 309(j)(4)(E) of the Communications Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."²⁷ The Commission adopted safeguards designed to ensure that the requirements of this section are satisfied, including a transfer disclosure requirement for 800 MHz SMR licenses obtained through the competitive bidding process. An applicant seeking approval for a transfer of control or assignment of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license.²⁸

With respect to small businesses, we have adopted unjust enrichment provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use the competitive bidding process to obtain a license at a lower cost than they would otherwise have to pay and to later sell it at a profit, and to ensure that large businesses do not become the unintended beneficiaries of measures meant to help small firms. Small business licensees seeking to transfer their licenses to entities which do not qualify as small businesses (or which qualify for a lower bidding credit), as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the value of the benefit conferred by the government.

The *Second Report and Order* also adopts rules for 800 MHz SMR partitioning and

²⁶ The lower 80 channels were divided into 16 blocks of 5 channels each and the General Category channels were divided into 3 blocks of 50 channels each. This results in 19 channels blocks available for auction in each of the 175 EAs.

²⁷ 47 U.S.C. § 309(j)(4)(E).

²⁸ 47 C.F.R. § 90.913(b)(2).

disaggregation rules. These rules contain information requirements that will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Form 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information. Applicants (including small businesses) filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

E. Steps Taken to Minimize Any Significant Economic Burdens on Small Entities:

Section 309(j)(3)(B) of the Communications Act²⁹ provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods.³⁰ In awarding geographic area 800 MHz licenses in the lower 230 channels, the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission finds that it is appropriate to establish special provisions in the 800 MHz SMR rules for the lower 230 channels for competitive bidding by small businesses. The Commission believes that small businesses applying for these licenses should be entitled to bidding credits.

In order to ensure the more meaningful participation of small business entities in the 800 MHz auctions, the Commission has adopted a two-tier definition of small businesses. This approach will give qualifying small businesses bidding flexibility. A small business will be defined as an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years that do not exceed \$3 million. A very small business will be defined as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding years that do not exceed \$15 million. The Commission will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant. The Commission will establish bidding credits consistent with the two-tiered definition of a small business. Small businesses that, together with affiliates and controlling principals, have average gross

²⁹ 47 U.S.C. § 309(j)(3)(B).

³⁰ 47 U.S.C. § 309(j)(4)(A).

revenues for the three preceding years that do not exceed \$3 million, will receive a 35 percent bidding credit. Small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years that do not exceed \$15 million, will receive a bidding credit of 25 percent.

The Commission is also extending geographic partitioning and disaggregation to all entities eligible to be 800 MHz and 900 MHz SMR licensees. The Commission believes that this provision will allow SMR licensees to tailor their business strategies and allow them to use the spectrum more efficiently, will allow more entities to participate in the provision of SMR services, and will facilitate market entry by small entities that have the ability to provide service only to a limited population.

F. Significant Alternatives Considered and Rejected:

The Commission considered a number of alternative channelization plans for licensing the 150 General Category 800 MHz SMR channels. The three alternatives were: (a) a 120-channel block, a 20-channel block and a 10-channel block; (b) six 25-channel blocks; or (c) fifteen 10-channel blocks.

Some commenters argued that allotting large contiguous blocks would not suit the needs of smaller SMR systems, which typically trunk smaller numbers of non-contiguous channels.³¹ These commenters argued that large blocks of contiguous channels could be prohibitively expensive to bid for at auction, thereby limiting the opportunities for smaller operators to take advantage of geographic area licensing.

In order to accommodate licensees who wanted contiguous as well as those that wanted large blocks of spectrum, the Commission adopted the Industry Proposal and allot three contiguous 50-channel blocks. As for the concerns of smaller entities that such blocks may be too large, the Commission found that such entities will have the opportunity to acquire smaller amounts of spectrum compatible with their existing technology through the newly-created disaggregation rules.

The Commission adopted a proposal to allow incumbent licensees in the lower 230 channels to make system modifications within their interference contours without prior Commission approval, so long as they do not expand the 18 dBμV/m interference contour of their systems. As noted above, the Industry Proposal called for the Commission to permit incumbent licensees in the lower 230 channels to negotiate expansion rights within each EA through a settlement process.³² The Commission rejected this approach finding that it would not serve the public interest. The Commission found that the Industry Proposal would foreclose new entrants from obtaining spectrum on any of the lower 230 channels that are subject to a settlement. In any market where all of the channels in an EA were allocated by such settlements, the result would be that no opportunities for geographic licensing would be available to new entrants. The Commission also found that the Industry Proposal would preclude competition in the licensing process and restrict the number of potential applicants who can obtain licenses. Thus, it could yield a higher concentration of licenses than would result if non-incumbents were allowed to compete for the spectrum at the same time. The Commission also found that the Industry Proposal would also be inconsistent with the approach it has adopted in other services where it has converted from site-by-site licensing to geographic area licensing.

³¹ Sierra Comments at 2; Fresno Comments at 24.

³² See SMR WON, AMTA, Nextel Joint Reply Comments *seriatum*.

The Commission adopted bidding credits qualified small businesses entities in the lower 230 channel auctions. Coral Cables sought to have eligibility for, and percentage of, bidding credits set at different levels for public safety entities.³³ The Commission found that its rules were reasonable and met the concerns of commenters and that the bidding credits took into account the fact that different small businesses will pursue different strategies.

The Commission declined to adopt rules to allow licensees who qualify as small businesses in a geographic area 800 MHz SMR license auction for the lower 230 channels to pay their winning bid amount in installments over the term of the license. The Commission found that a better alternative to help small businesses, as well as ensure new services to the public is to offer a higher level of bidding credit.

Finally, the Commission decline to set aside a special block of 800 MHz SMR channels for entrepreneurs. The Commission found that small businesses will have significant opportunity to compete for licenses given the special bidding credit provisions it had adopted.

G. Report to Congress

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Second Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.

³³ Coral Cables Comments at 9.

Separate Statement
of Commissioner Rachelle B. Chong

Re: *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, *Memorandum Opinion and Order on Reconsideration and Second Report and Order*

The decisions we issue today complete our process of developing a new licensing framework for 800 MHz licensees. I support our decisions because I believe that our movement away from a site-by-site to a geographic licensing scheme not only eliminates a cumbersome administrative process, but also promotes competition, provides SMR licensees with additional flexibility, and brings our 800 MHz regulation more into sync with our regulation of other CMRS providers.

I also support our decision to award mutually exclusive applications for these geographic licensees through competitive bidding. Most of the auction rules we have adopted for the 800 MHz service are consistent with the rules we have adopted for other services. In one significant respect, however, we have departed from Commission precedent: on reconsideration we decided to eliminate installment payments for small businesses who participate in the auction for the upper 200 channels, and we have deferred the issue of the propriety of the installment payments for the lower 230 channels to our Part 1 rulemaking. I supported these decisions because I share my colleagues' concerns about the difficulties associated with the Commission's administration of the installment payment program, and I felt that we should not delay the 800 MHz auctions while we worked out these issues. However, I write separately to express my concern about what this change might mean to small businesses' and woman and minority-owned businesses' ability to participate in this and future auctions.

The Commission has an obligation in designing its auction procedures under section 309(j) to seek to disseminate licenses among a wide variety of applicants including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission's obligation to promote opportunities for small businesses is also set forth in section 257 of the Act. Although Sections 309(j) and 257 give the Commission significant discretion in deciding how to achieve this objective, to date, installment payments, together with bidding credits, have been the primary means the Commission has used to overcome these barriers and enhance the opportunities for small businesses and women and minority-owned enterprises.³⁴ I am worried that our decision to eliminate installment payments for the upper 200 channels will adversely impact the designated entities who wish to bid on these licenses. In this regard, our recent report summarizing the Commission's implementation of section 257 noted commenting parties'

³⁴ See, e.g., *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the CMRS Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, 7844 (1996); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Sixth Report and Order, 11 FCC Rcd 136, 158 (1995).

belief that a lack of access to the capital markets and insufficient financing is the major barrier to small business participation in the Communications market.³⁵

That being said, I share my colleagues' concern that the installment payment program, as currently structured, has put the Commission in a very difficult position. There is an inherent conflict between the Commission's dual role as regulator and lender. We are now struggling with how to resolve this tension in response to requests by PCS C Block licensees to restructure payment obligations. I can appreciate the reluctance to expand the scope of the installment payment program until we work through some of these difficult issues.

I do not know what the solution should be, but I encourage all commenters, including representatives of small businesses and women and minority-owned enterprises, to think creatively about ways in which we can make the installment payment program more workable or to suggest other mechanisms we can pursue to enhance opportunities for these businesses.

³⁵ *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, GN Docket No. 96-113, FCC 97-164, ¶¶ 35-36 (rel. May 8, 1997) (citing respondents to the Small Business in Telecommunications survey).